

Byron S. Hollins, SB# 113423
Laura M. Levy, SB# 216054
Adam L. Robinson, SB# 251441
HOLLINS & LEVY LLP
23801 Calabasas Road, Suite 100
Calabasas CA 91302-1597
Phone: 818.223.0300
Fax: 818.223.0310

Attorneys for Defendant
Barney, McKenna & Olmstead, P.C.
[erroneously sued as Barney,
McKenna & Omstead, PC]

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

STEVEN FEHER,
Plaintiff,

v.

SCOTT J. FAUX, an individual;
FAUX, WALKER & JONES, PLLC, a
Utah professional limited liability
company; and BARNEY, MCKENNA
& OMSTEAD, PC, a Utah
professional corporation;
Defendants.

Case no. 2:15-cv-09884-SVW
(FFMx)

Complaint filed: 12/28/2015

**NOTICE OF MOTION AND
MOTION TO DISMISS
PURSUANT TO FEDERAL
RULES OF CIVIL PROCEDURE
12(b)(6); MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: March 14, 2016

Time: 1:30 p.m.

Judge: Hon. Stephen V. Wilson
Courtroom: 6

[Filed and served with Request for
Judicial Notice, Declaration of
Michael Eric Olmstead and
Proposed Order]

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on March 14, 2016, at 1:30 p.m., or as
soon thereafter as the matter may be called in Courtroom 6 of the above-
entitled court, which is located at 312 North Spring Street Los Angeles, CA
90012-4701, defendant Barney, McKenna & Olmstead, P.C. [erroneously
named as Barney, McKenna & Omstead, PC], will move the Court for an order
dismissing it from this action pursuant to Fed. R. Civ. P. 12(b)(6) for failure to

1 state a claim upon which relief can be granted as the complaint is time barred
2 against the moving defendant on its face.

3 The motion is based upon this notice, the attached memorandum of
4 points and authorities, the papers pleadings and other documents in the court's
5 files for the matter, and such further evidence and argument as may be elicited
6 at the hearing on this motion.

7 Pursuant to Local Rule 7-3, this Motion is made following the parties'
8 meet and confer conference, which took place on January 27, 2016, before the
9 filing of this Motion.

10 Dated: February 4, 2016

HOLLINS & LEVY LLP

11
12 By: /s/ Byron S. Hollins
13 Byron S. Hollins
14 Attorneys for Defendant
15 Barney, McKenna & Olmstead,
16 P.C.
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOTICE OF MOTION.

TABLE OF AUTHORITIES. iii

MEMORANDUM OF POINTS AND AUTHORITIES. 1

I. INTRODUCTION. 1

II. PERTINENT FACTUAL BACKGROUND. 2

III. ARGUMENT. 3

 A. The Action Should be Dismissed Against BMO, With Prejudice,
 Pursuant to Fed. R. Civ. P. 12(b)(6) Because Plaintiff’s Complaint
 Is Time Barred Under Cal. Code Civ. Proc. Section 340.6. 3

 i. The Purported Wrongful Act or Omissions of BMO Occurred
 No Later Than 2012, When Mr. Faux Left BMO to Start His
 Own Firm. 6

 iii. Plaintiff Knew or Should Have Known of the Facts
 Supporting the Alleged Malpractice When He Agreed to
 Enter Into the Allegedly Imprudent Life Insurance Contracts
 7

 iiii. As a Matter of Law, Plaintiff Sustained Actual Damages More
 than One Year Prior to the Filing of the Instant Action. 8

 iv. There Was No Continuing Representation by BMO after Mr.
 Faux Left BMO to Start His Own Firm. 11

IV. CONCLUSION. 16

TABLE OF AUTHORITIES

| Cases | Page(s) |
|---|----------------|
| Federal | |
| <i>Albrecht v. Lund</i> , 845 F.2d 193 (9 th Cir. 1988)..... | 5 |
| <i>Avco Corp. v. Precision Air Parts, Inc.</i> , 676 F.2d 494 (11th Cir. 1982). | 3 |
| <i>Conley v. Gibson</i> 355 U.S. 41. | 5 |
| <i>Estate of Blue v. County of Los Angeles</i> , 120 F.3d 982 (9th Cir. 1997). | 4 |
| <i>Hiland Dairy, Inc. v. Kroger Co.</i> , 402 F.2d 968 (8th Cir. 1968). | 4 |
| <i>Jablon v. Dean Witter & Co.</i> , 614 F.2d 677 (9th Cir. 1980). | 3 |
| <i>Jacobson v. Hughes Aircraft Co.</i> , 105 F.3d 1288 (9th Cir.1997)..... | 5 |
| <i>Marder v. Lopez</i> , 450 F.3d 445 (9th Cir. 2006). | 4 |
| <i>McNamara-Blad v. Association of Professional Flight Attendants</i> , 275 F.3d 1165 (2002). | 4 |
| <i>Parrino v. FHP, Inc.</i> , 146 F.3d 699 (9th Cir. 1998). | 4 |
| <i>Sears, Roebuck & Co. v. Metropolitan Engravers, Ltd.</i> , 245 F.2d 67 (9th Cir. 1956). | 4 |

| | | |
|----|---|--------|
| 1 | <i>Western Mining Council v. Watt</i> | |
| 2 | 643 F.2d 618 (9 th Cir. 1981)..... | 4 |
| 3 | <i>United States v. Ritchie,</i> | |
| 4 | 342 F.3d 903 (9th Cir.2003)..... | 4 |
| 5 | | |
| 6 | California | |
| 7 | <i>Beal Bank, SSB v. Arter & Hadden, LLP</i> | |
| 8 | 42 Cal.4th 503 (2007) | 10, 11 |
| 9 | <i>Budd v. Nixen</i> | |
| 10 | 6 Cal.3d 195 (1971)..... | 9 |
| 11 | <i>Coscia v. McKenna & Cuneo</i> | |
| 12 | 25 Cal.4th 1194 (2001) | 9 |
| 13 | | |
| 14 | <i>Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison</i> | |
| 15 | 18 Cal.4th 739 (1998) | 9, 10 |
| 16 | <i>Levin v. Graham & James</i> | |
| 17 | 37 Cal.App.4th 798 (1995)..... | 6 |
| 18 | <i>McGee v. Weinberg</i> | |
| 19 | 97 Cal.App.3d 798 (1979). | 8 |
| 20 | <i>Peregrine Funding, Inc. v. Sheppard, Mullin, Richter & Hampton</i> | |
| 21 | 133 Cal.App.4th 658 (2005)..... | 8 |
| 22 | | |
| 23 | <i>Southland Mechanical Contractors Corp. v. Nixen</i> | |
| 24 | 119 Cal.App.3d 417 (1981). | 6 |
| 25 | <i>Stoll v. Superior Court</i> | |
| 26 | 9 Cal.App.4th 1362 (1992)..... | 6 |
| 27 | <i>Stueve Bros. Farms, LLC v. Berger Kahn</i> | |
| 28 | (2013) 222 Cal.App.4th 303..... | 11 |

1 *Village Nurseries v. Greenbaum*
2 101 Cal.App.4th 26 (2002) 8

3 *Worton v. Worton*
4 234 Cal.App.3d 1638 (1991). 7, 8

6 ***Rules***

7 Fed.R.Civ.P. 12(b)(6). 1, 3, 4,11

8 ***California Statutes***

9
10 *Cal. Code Civ. Proc. Section 340.6*.. . . . 1, 3, 5, 6, 7, 10, 11

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff, Steven Feher (hereinafter “plaintiff” or “Feher,”) filed this legal malpractice action under California Law against an individual attorney licensed to practice in Utah, defendant Scott J. Faux and his current firm, defendant Faux Walker & Jones PLLC, a Utah Limited Liability Professional Corporation (hereinafter, Mr. Faux and his current firm shall be collectively referred to as “Faux.”) Also named was Mr. Faux’s former firm (which plaintiff admits Mr. Faux left in 2012,) moving defendant Barney, McKenna & Olmstead, P.C. [erroneously sued as Barney, McKenna & Omstead, PC] (hereinafter “BMO,”) a Utah Professional Corporation.¹

The crux of plaintiff’s complaint is that in or around 2005, and continuing through April 2012, Faux and BMO represented him and, imprudently, advised him to purchase certain life insurance policies which, by their very nature, caused plaintiff immediate and significant financial damage.

However, plaintiff’s complaint against BMO should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), as plaintiff cannot state a claim for which relief can be granted as plaintiff’s complaint is, on its face, time barred under Cal. Code Civ. Proc. section 340.6 as plaintiff: (a) knew of the facts constituting the purported malpractice more than one year prior to the filing of the instant action; and (b) none of the exclusive tolling provisions of that section toll plaintiff’s action against BMO.

Accordingly, for the reasons set forth herein BMO respectfully requests

¹ Plaintiff alleges in his complaint that, at no time, did BMO have any attorneys licensed to practice in California. This is false as Michael Eric Olmstead, California State Bar number 130962, has been licensed to practice in California continuously since his admission on December 11, 1987. (Olmstead Dec., ¶3.).

the Court enter an order dismissing this action against BMO.

II. PERTINENT FACTUAL BACKGROUND

BMO is a law firm located in Utah with attorneys licensed to practice in the states of Utah, Arizona, California, Nevada. (Declaration of Michael Eric Olmstead ("Olmstead Dec."), ¶3, Exhibit "A.")

Plaintiff alleges that in 2005, BMO and Mr. Faux began providing him legal services. (Doc 1, Complaint, ¶7.)

As part of these legal services, plaintiff alleges that in 2008 Mr. Faux flew to Hawaii and advised plaintiff to purchase "high value" life insurance policies which, plaintiff alleges, Mr. Faux advised him he would be able to borrow against in the future when his income ran out.² Plaintiff alleges that Mr. Faux and BMO, failed to properly investigate the efficacy of the purchase of the life insurance policies for their intended purposes and that the life insurance policies required the payment of premiums by plaintiff. (Id., ¶¶11-18.)

Plaintiff alleges that in 2010, this time in Los Angeles, he met with Mr. Faux and the insurance broker, Carpenter, and, on their advice, purchased an additional, ineffective, policy. (Id., ¶¶19-20.) Additionally, in 2009 and 2010, Mr. Faux advised plaintiff to create a captive insurance company whereby Mr. Feher would invest his resources as premiums into the aforementioned policies. (Id. ¶21-24.)

Plaintiff alleges that in 2012, during a meeting in Los Angeles, Mr. Faux advised plaintiff to purchase a replacement life insurance policy which, itself, required a \$228,000.00 surrender fee to be paid by plaintiff. (Id. ¶¶26-27.) It was also in 2012 that Mr. Faux left the BMO firm, taking plaintiff with him as his client. (Id., ¶¶5, 27-28; Olmstead Dec., ¶¶4-6, exhibits "A," and "B," thereto.)

² Plaintiff's main source of income was from patent royalties which would cease in 2014.

1 No other specific allegations are made regarding BMO in plaintiff's complaint.

2 Finally, as a result of the purportedly imprudent advice to purchase the
3 life insurance policies, on December 22, 2014, plaintiff filed an action against
4 the insurance companies and the broker, Mr. Carpenter, seeking a return of
5 premiums and other damages. (Request for Judicial Notice "RJN," Exhibits "1,"
6 and "2.")

7 This action was filed on December 23, 2015, more than one year after
8 plaintiff filed suit against the broker and insurers.

9 This motion follows.

10 **III. ARGUMENT**

11 **A. The Action Should Be Dismissed Against** 12 **BMO, with Prejudice, Pursuant to Fed. R. Civ.** 13 **P. 12(b)(6) Because Plaintiff's Complaint Is** 14 **Time Barred under Cal. Code Civ. Proc.** 15 **Section 340.6.**

16 A statute of limitations defense may be raised by a F.R.Civ.P. 12(b)(6)
17 motion to dismiss when the statute's running is apparent on the face of the
18 complaint. *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980); see
19 *Avco Corp. v. Precision Air Parts, Inc.*, 676 F.2d 494, 495 (11th Cir. 1982),
20 cert. denied, 459 U.S. 1037, 103 S.Ct. 450 (1982).

21 For a F.R.Civ.P. 12(b)(6) motion, a court generally cannot consider
22 material outside the complaint. Nonetheless, a court may consider exhibits
23 submitted with the complaint. In addition, a "court may consider evidence on
24 which the complaint 'necessarily relies' if: (1) the complaint refers to the
25 document; (2) the document is central to the plaintiff's claim; and (3) no party
26 questions the authenticity of the copy attached to the 12(b)(6) motion." *Marder*
27 *v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). A court may treat such a
28 document as "part of the complaint, and thus may assume that its contents are

1 true for purposes of a motion to dismiss under Rule 12(b)(6)." *United States v.*
 2 *Ritchie*, 342 F.3d 903, 908 (9th Cir.2003). Such consideration prevents
 3 "plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting
 4 reference to documents upon which their claims are based." *Parrino v. FHP,*
 5 *Inc.*, 146 F.3d 699, 706 (9th Cir. 1998). Moreover, "judicial notice may be
 6 taken of a fact to show that a complaint does not state a cause of action."
 7 *Sears, Roebuck & Co. v. Metropolitan Engravers, Ltd.*, 245 F.2d 67, 70 (9th
 8 Cir. 1956); see *Estate of Blue v. County of Los Angeles*, 120 F.3d 982, 984
 9 (9th Cir. 1997).

10 In resolving a rule 12(b)(6) motion, the Court must (1) construe the
 11 complaint in the light most favorable to the plaintiff and (2) accept all
 12 well-pleaded factual allegations as true. *McNamara-Blad v. Association of*
 13 *Professional Flight Attendants*, 275 F.3d 1165, 1169 (2002).

14 However, the court does not need to accept as true unreasonable
 15 inferences, unwarranted deductions of fact, or conclusory legal allegations cast
 16 in the form of factual allegations. *Western Mining Council v. Watt*, 643 F.2d
 17 618, 624 (9th Cir. 1981), cert. denied, 454 U.S. 1031 (1981); *Hiland Dairy, Inc.*
 18 *v. Kroger Co.*, 402 F.2d 968, 973 (8th Cir. 1968), cert. denied, 395 U.S. 961
 19 (1969).

20 If it appears that the plaintiff can prove no set of facts in support of the
 21 claim which would entitle plaintiff to relief, dismissal with prejudice is
 22 appropriate. *Conley v. Gibson*, 355 U.S. 41; *Jacobson v. Hughes Aircraft Co.*,
 23 105 F.3d 1288, 1292 (9th Cir.1997). In that same vein, a dismissal with
 24 prejudice is appropriate if amendment of the complaint in an effort to correct
 25 its deficiencies would be futile. *Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir.
 26 1988).

27 As set forth below, the instant action presents just such a case as plaintiff
 28 is alleging that BMO, a firm which has not represented plaintiff regarding the

1 subject matter of the complaint since 2012, committed malpractice and
 2 breached their fiduciary duties. This matter is time barred as to BMO under
 3 Cal. Code Civ. Proc. section 340.6 and should be dismissed.

4 Under Cal. Code Civ. Proc. section 340.6, absent continuing
 5 representation or lack of damages, a former client has only one year to sue his
 6 or her lawyers after he or she discovers, or should have discovered, the facts
 7 from which his or her claims for legal malpractice or breach of contract arise.
 8 Specifically, Cal. Code Civ. Proc. section 340.6 provides in pertinent part:

9 “(a) An action against an attorney for a wrongful
 10 act or omission . . . arising in the performance of
 11 professional services **shall be commenced within**
 12 **one year after the plaintiff discovers, or through**
 13 **the use of reasonable diligence should have**
 14 **discovered the facts constituting the wrongful act**
 15 **or omission**, or four years from the date of the
 16 wrongful act or omission, whichever occurs first. In no
 17 event shall the time for commencement of legal action
 18 exceed four years except that the period shall be tolled
 19 during the time that any of the following exist:

20 (1) The plaintiff has not sustained actual injury.

21 (2) The attorney continues to represent the
 22 plaintiff regarding the specific subject matter in which
 23 the alleged wrongful act or omission occurred.

24 (3) The attorney willfully conceals the facts
 25 constituting the wrongful act or omission when such
 26 facts are known to the attorney, except that this
 27 subdivision shall toll only the four-year limitation.

28 (4) The plaintiff is under a legal or physical

1 disability which restricts the plaintiff's ability to
2 commence legal action." [Emphasis added.]

3 Under the legislative history and subsequent case law, the one year
4 statute of limitations applies to *any* cause of action arising from the provision
5 of legal services, other than actual fraud. "In all cases other than actual fraud,
6 whether the theory of liability is based on the breach of an oral or written
7 contract, a tort, or a breach of fiduciary duty, the one-year statutory period
8 applies. *Levin v. Graham & James* (1995) 37 Cal.App.4th 798, 805 [44
9 Cal.Rptr.2d 69]; See, also, *Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362
10 [12 Cal. Rptr. 2d 354], 1366-1369, and *Southland Mechanical Contractors*
11 *Corp. v. Nixen* (1981) 119 Cal.App.3d 417 [173 Cal. Rptr. 917.]

12 Here, plaintiff conclusively alleges that both causes of action relate to the
13 provision of legal services by BMO, thus making section 340.6's limitations
14 period applicable to this action. (Doc. 1, Complaint, ¶¶7, 9.)

15 **i. The Purported Wrongful Act or Omissions of BMO**
16 **Occurred No Later than 2012, When Mr. Faux Left BMO**
17 **to Start His Own Firm.**

18 As is clear from the allegations of the complaint, plaintiff alleges that
19 BMO's wrongful acts or omission was Faux's allegedly imprudent advice to
20 purchase life insurance policies, set up a captive insurance company related
21 thereto, to replace the life insurance policies with a new one which resulted in
22 a \$228,000.00 loss, and the failure to notify plaintiff of a purported conflict of
23 interest regarding an alleged "kickback" to Mr. Faux on the sale of the
24 insurance policies. (Doc. 1, Complaint, ¶¶17, 18, 21, 24, 29.)

25 All of the purported wrongful acts or omissions of BMO occurred in, or
26 before, 2012, when Mr. Faux left BMO to start his own firm. Accordingly, under
27 *Cal. Code Civ. Proc.* section 340.6, BMO's wrongful "act or omission" as
28 alleged by plaintiff, occurred no later than 2012, or at least three full years prior

1 to this action being filed on December 21, 2015.

2 **ii. Plaintiff Knew or Should Have Known, of the Facts**
 3 **Supporting the Malpractice When He Agreed to Enter**
 4 **into the Allegedly Imprudent Life Insurance Contracts.**

5 As set forth above, an action arising out of the provision of legal services
 6 **"... shall be commenced within one year after the plaintiff discovers, or**
 7 **through the use of reasonable diligence should have discovered the facts**
 8 **constituting the wrongful act or omission."** (*Cal. Code Civ. Proc.* section
 9 340.6, emphasis added.)

10 "Under Code of Civil Procedure section 340.6 [...] the one-year period is
 11 triggered by the client's discovery of 'the facts constituting the wrongful act or
 12 omission,' not by his discovery that such facts constitute professional
 13 negligence, i.e., by discovery that a particular legal theory is applicable based
 14 on the known facts." *Worton v. Worton* (1991) 234 Cal.App.3d 1638, 1650 [286
 15 Cal.Rptr. 410] [internal citations omitted.]

16 In other words, the plaintiff must only know, or have reason to know, of
 17 the facts which form the basis of the malpractice claim, not that those facts
 18 demonstrate any error or omission on the part of the attorney. "It is irrelevant
 19 that the plaintiff is ignorant of his legal remedy or the legal theories underlying
 20 his cause of action." *Worton, supra* p. 1650; See, also, *Peregrine Funding,*
 21 *Inc. v. Sheppard, Mullin, Richter & Hampton* (2005) 133 Cal.App.4th 658 [35
 22 Cal. Rptr. 3d 31], 682-685; *Village Nurseries v. Greenbaum* (2002) 101
 23 Cal.App.4th 26, 42-43; *McGee v. Weinberg* (1979) 97 Cal.App.3d 798.

24 Here, plaintiff alleges that the malpractice was: (1) the purchase of life
 25 insurance contracts (which happened in 2008 and 2012); (2) formation of the
 26 captive insurance company; (3) the replacement of one of the life insurance
 27 policies for a \$228,000.00 fee (loss); and (4) the failure of Mr. Faux to inform
 28 plaintiff of the potential conflict of interest related to those transactions. (Doc.

1, Complaint, ¶¶17, 18, 21, 24, 29.) Thus, plaintiff knew of the facts constituting the malpractice, the allegedly imprudent advice related to the purchase of the life insurance, at the time he accepted the policies, the change of policies and the formation of the captive insurance company, in 2008, 2009, 2010 and 2012.

Furthermore, plaintiff cannot hope to amend his complaint to show a later discovery of the facts as he, conclusively, admits that he was “informed by another insurance broker in 2014 that the policies were improper.” (Doc 1, Complaint, ¶28.) As a result, plaintiff filed suit against the broker, Carpenter, and the insurers on December 22, 2014, more than one year before the December 28, 2015, filing of this action.

Accordingly, plaintiff was actually or constructively on notice of the facts constituting the alleged malpractice of BMO in, at the latest, 2012, and certainly more than one year before the filing of this action, thereby invoking the one year limitations period set forth under California law.

iii. As a Matter of Law, Plaintiff Sustained Actual Damages More Than One Year Prior to the Filing of the Instant Action.

Plaintiff sustained actual damages when he purchased the insurance policies in 2008 and 2010, and as plaintiff admits at paragraph 31 of his complaint, he became unable to pay any premiums on said policies “in the first quarter of 2014.” Furthermore, at the latest, plaintiff sustained damages on December 22, 2014, when he filed his action against the insurers and Carpenter as a result of the purportedly imprudent advice to purchase the life insurance policies. Thus, plaintiff sustained damages more than one year prior to filing this action on December 28, 2015.

In California, a legal malpractice claim accrues and the statute begins to run “before the client sustains all, or even the greater part, of the damages

occasioned by his attorney's negligence. **Any appreciable and actual harm flowing from the attorney's negligent conduct establishes a cause of action upon which the client may sue.**" [Emphasis added, internal citations omitted.] *Budd v. Nixen* (1971) 6 Cal.3d 195, 201; *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 750 [76 Cal. Rptr. 2d 749, 958 P.2d 1062]. "The test for actual injury is 'whether the plaintiff has sustained any damages compensable in an action, other than one for actual fraud, against an attorney for a wrongful act or omission arising in the performance of professional services.'" *Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1206-1207 [108 Cal.Rptr.2d 471.]

Based upon plaintiff's own allegations, he sustained compensable damages more than one year prior to the filing of this action.

First, plaintiff suffered actual harm in 2008 and 2010 when he purchased insurance policies which required him to pay annual premiums. [Doc. 1, Complaint, ¶¶12-20.]³ Since plaintiff alleges that the errors/omissions of defendants was his being advised to purchase the life insurance policies, his acceptance of the policies which required the payment of premiums constituted "appreciable and actual harm" flowing from those purported errors/omissions. Plaintiff admits that he is seeking the return of premiums paid as damages in this action. [Doc. 1, Complaint ¶¶34, 38, 43.]

Second, even if the purchase of the policies, and payment of premiums, did not constitute actual damages, plaintiff further sustained actual damages in 2012 when Faux is alleged to have advised plaintiff to purchase a "replacement" insurance policy which led to plaintiff incurring a \$228,000.00

³ It can be inferred by plaintiff's allegations that the premiums totaled hundreds of thousands of dollars in the first year as he alleges that the commission to the broker in the first year, which is "often in excess of the entirety of the first year's premium," was \$400,000.00. [Doc. 1, FAC, ¶¶13, 15.)

1 “surrender fee” while also allowing one of the policies to “lapse” which led to
 2 “all of its value” being lost. [Doc 1, Complaint ¶¶26-27.] Plaintiff admits that he
 3 is seeking the return of fees paid as damages in this action. [Doc. 1, Complaint
 4 ¶¶ 38, 43.]

5 Finally, plaintiff alleges actual damages arising out of the purported
 6 errors/omissions of the defendants in the “first quarter of 2014” when his
 7 income ran out and he had no source of funds to continue paying the
 8 premiums which caused the final policy he purchased to lapse. [Doc 1,
 9 Complaint, ¶¶31-32.] This caused plaintiff to file, on December 22, 2014, his
 10 action against Carpenter and the insurers for the return of premiums and other
 11 damages. As set forth in *Jordache*, supra, plaintiff’s filing of the complaint
 12 against the insurers constitutes actual, appreciable, harm under the meaning
 13 of Cal. Code Civ. Proc., section 340.6.

14 Accordingly, plaintiff sustained damages in this action as early as 2008
 15 when he began paying the premiums he now seeks compensation for, and
 16 certainly more than one year before this action was filed.

17 **iv. There Was No Continuing Representation By BMO after**
 18 **Mr. Faux Left BMO to Start His Own Firm.**

19 Any continuing representation tolling applicable to BMO ended in 2012
 20 when Mr. Faux left BMO to start his new firm and took plaintiff with him as a
 21 client.

22 “Under California law, the statute of limitations for attorney malpractice
 23 claims arising from a given matter is tolled for the duration of the attorney’s
 24 representation of the client in that matter. (Code Civ. Proc., § 340.6, subd.
 25 (a)(2).)” *Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 505
 26 [66 Cal. Rptr. 3d 52, 167 P.3d 666.] The California Supreme Court has held
 27 that “[w]hen an attorney leaves a firm and takes a client with him or her, ... the
 28 tolling in ongoing matters [does not] continue for claims against the former firm

1 and partners.” (Id.; See also *Stueve Bros. Farms, LLC v. Berger Kahn* (2013)
 2 222 Cal.App.4th 303, 314 [166 Cal.Rptr.3d 116].)

3 Here, as is alleged in the complaint, Mr. Faux left BMO in 2012. At that
 4 time, Mr. Faux and his new firm assumed representation of plaintiff regarding
 5 the subject matter at issue. Plaintiff does not allege any actions by BMO taken
 6 on his behalf after 2012. [See Doc 1, FAC, ¶¶27-34.]⁴

7 Accordingly, BMO ceased to “represent the plaintiff regarding the specific
 8 subject matter in which the alleged wrongful act or omission occurred” in 2012
 9 when Mr. Faux left and plaintiff is not entitled to avail himself of the tolling
 10 provision of Cal. Code Civ. Proc. section 340.6(2).

11 **IV. CONCLUSION**

12 Based on the foregoing it is respectfully submitted that this action should
 13 be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) as plaintiff’s claims against
 14 BMO are barred by the one year statute of limitations set forth in Cal. Code
 15 Civ. Proc. section 340.6, since plaintiff knew of the facts constituting the
 16 alleged malpractice and sustained actual harm more than one year prior to the
 17 filing of this action.

18 Dated: February 4, 2016

Respectfully submitted,
 HOLLINS & LEVY LLP

21 By: /s/ Byron S. Hollins
 22 Byron S. Hollins
 23 Attorneys for defendant
 Barney, McKenna & Olmstead,
 P.C.

24
 25
 26
 27
 28

⁴ See also Olmstead Dec., ¶¶4-6, Exhibits “A,” and “B,” thereto.